Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

YALE GARBER AND STEPHEN G. WEIL,

*Petitioners,*

versus

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

WILLIAM P. CALLAHAN
295 Madison Avenue
Forty-Fourth Floor
Tower Suite
New York, NY 10017
Tel: 212-889-3000
Fax: 212-889-3242
Email:
DBL007@worldnet.att.net

BENEDICT P. KUEHNE
*Counsel of Record*
SALE & KUEHNE, P.A.
Bank of America Tower
Suite 3550
100 S.E. 2 Street
Miami, Florida 33131-2154
Telephone: 305-789-5989
Fax: 305-789-5987
Email:
ben.kuehne@lawyers.com

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OR CALL COLLECT (402) 342-2831

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## QUESTIONS PRESENTED

1. Does the Eleventh Circuit's restrictive application of the public authority defense conflict with other circuits on a vital question of law, and compromise an accused's meaningful opportunity to present a complete defense as guaranteed by the due process provisions of the United States Constitution?

2. Does the unannounced use of a "blockbuster" jury instruction by a trial judge, when the jury was deliberating without any serious difficulty, render a verdict unfairly coercive in accelerating a jury's deliberations after seventeen days of trial testimony?

3. When the prosecution in a criminal case seizes defense evidence in the full and open presence of the jury, while announcing the evidence constitutes the fruit of the crime, and the jury is informed by the trial judge that the prosecution's action is valid, is the resulting conviction unfairly compromised in violation of due process?

4. Does an enhanced sentence for money laundering violate *Apprendi v. New Jersey* when a defendant is sentenced on the basis of a quantity of money not alleged in the indictment and for which the jury did not find guilt beyond a reasonable doubt?

## LIST OF PARTIES

The parties to the proceedings in the lower tribunal are:

Yale Garber

Stephen G. Weil

United States of America

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Yale Garber and Stephen G. Weil request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The decision of the Court of Appeals is unpublished, but is reproduced in the Appendix, at App. 1-5.

## JURISDICTION

The Court of Appeals entered its judgment on November 15, 2001. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254 and Supreme Court Rule 13.1. The appellate court had jurisdiction pursuant to 28 U.S.C. § 1291.

## PROVISIONS OF LAW

**U.S. Constitution, Fifth Amendment.**

No persons shall . . . be deprived of life, liberty, or property without due process of law . . .

## STATEMENT OF THE CASE

Petitioners are two elderly gentlemen with outstanding backgrounds as law abiding citizens. They became ensnared in an undercover money laundering sting operation targeting the Seminole Indians, known as Operation Seminole Wind and Operation Capos & Indians. Yale Garber, seventy-five years old, was a retired lawyer and best friend of Stephen G. Weil, a sixty-six year old career FBI confidential source who had worked with federal law enforcement agencies for more than twenty years. Both men were convicted of money laundering and sentenced to prison terms of sixty-three months (Garber) and eighty-three months (Weil). App. 2.

In 1997, government undercover agents orchestrated a sting operation to persuade prominent officials of the Seminole Indian Tribe to launder purported drug proceeds. Unsuccessful in rounding up any Native Americans, the agents set their sights on these two old men who believed they were assisting the FBI in an authorized investigation. Weil, a documented FBI confidential source for more than twenty years, set out to obtain information about people involved in what he thought was an organized crime operation, and dutifully reported his contact and information to his FBI supervisor, Special Agent Toale, who in turn disseminated the information to FBI Supervisory Special Agent Sullivan. Agent Toale prepared an official FBI 302 report documenting Weil's information, but at the time of trial that report was missing from Weil's confidential FBI informant file. Weil's contemporaneous conversations with a journalist corroborated his status as a confidential FBI source during this operation.

For a period of twenty-one months (March 1997 – November 1998), the DEA undercover sting operation unfolded, with undercover agents providing cash in return for checks from petitioners and others. The undercover agents suggested that the cash came from illegitimate sources, but the tape recordings of conversations and meetings did not contain incriminating references to drugs.[1] Throughout their dealings with these undercover operations, Weil and Garber both endeavored to obtain documents and other information so they could help build a case for the FBI against the supposed money launderers.

The indictment alleged that Weil participated in laundering $165,000 and that Garber laundered $425,000 (App. 8-9), yet both Weil and Garber were sentenced for the full amount of the laundered funds (App. 43 & App. 31). During the trial, petitioners were prohibited from asserting the defense of public authority, notwithstanding that Weil was a documented FBI informant who informed the FBI of his involvement in the conduct for which petitioners were ultimately charged.

During the defense case at trial, Weil identified $10,000 in currency which he had received from the purported undercover money launderer and kept as evidence in the course of his FBI authorized informant role. As the currency was being moved into evidence, the prosecutor

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[1] On the eve of trial, the prosecution produced new transcript versions of the tape recordings, which not only differed substantially from the original certified transcripts, but also included drug terms which were not intelligible on the recorded tapes themselves.

announced, in the presence of the jury, " . . . the agent will take possession of the money." (App. 11). The prosecutor then informed both the judge and jury that the money was being "seized" because it was "drug money." Surprisingly, the trial judge agreed, instructing defense counsel in the presence of the jury to "give that money to the government." (App. 15).

At the close of the case, the jury's deliberations were somewhat protracted, with the jury twice indicating an inability to reach a verdict, prompting the court to give a deadlock instruction, even as the jury continued to make progress toward a verdict. Without first instructing counsel, the district judge gave a modified *Allen*[2] charge (App. 16-20), despite the fact that the trial had taken eighteen days and the jury had been deliberating less than two days. Inevitably, the jury returned guilty verdicts almost immediately thereafter.

On direct appeal, the Eleventh Circuit found no fault with the trial or the sentences. The appellate court held "that there was insufficient evidence to warrant a jury instruction on the defense of public authority." (App. 3). The appellate court rejected petitioner's *Allen* charge objection. (App. 5). Petitioner Weil's sentence did not violate *Apprendi*[3] in the court's view, because "the term of imprisonment is within the prescribed statutory maximum penalty for the underlying offense." (App. 5).

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[2] *Allen v. United States*, 124 U.S. 942 (1896).

[3] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

## REASONS FOR GRANTING THE WRIT

### I. The Eleventh Circuit's Restrictive Application Of The Public Authority Defense Conflicts With Other Circuits And Is Contrary To Due Process Protections.

This certiorari petition raises an issue of vital importance to the criminal justice system, arising from a court's refusal to allow a jury to determine if criminal defendants were acting pursuant to lawful public authority. Especially in today's environment of government-initiated undercover sting operations which target persons having no prior involvement in the government-designed criminal activity, the approach taken by the Eleventh Circuit to the defense of public authority is unnecessarily narrow, permitting a public authority jury instruction only if the defense can assert compelling evidence of actual authorization by a responsible government official. Yet, that narrow rule subverts the fact finding role of the jury to determine if a defendant acted under the authorization of an official having actual authority to approve the conduct at issue.

Traditionally, the validity of the public authority defense depends only on "whether the government agent in fact had the authority to empower the defendant to perform the acts in question." *United States v. Achter*, 52 F.3d 753, 755 (8th Cir. 1995). *See United States v. Fulcher*, 250 F.3d 244, 254 (3d Cir. 2001) ("defense of public authority requires reasonable reliance upon the actual authority of a government official to engage him in a covert activity."); *United States v. Blair*, 210 F.3d 285 (9th Cir. 2000) (unpublished) ("public authority defense is available when defendant has committed an otherwise

illegal act in reasonable and sincere reliance upon a statement or act of a government agent with actual legal authority to empower the commission of the illegal act in question."); *United States v. Pitt*, 191 F.3d 751, 757 (3d Cir. 1999).

The public authority defense is thus available – and must be presented to the jury for consideration – in every case in which the defendant acted in reliance on a public official who had actual authority. *United States v. Parker*, 267 F.3d 839, 843 (8th Cir. 2001). Yet, the Eleventh Circuit's required showing is far greater, requiring proof that the public official actually authorized the conduct in question. By raising the standard to require proof of actual authorization instead of limiting the showing that an official possessed authority to approve the conduct, the Eleventh Circuit undercut controlling law which compels a jury decision whenever there is any evidence, even though "weak, inconsistent, or of doubtful credibility." *United States v. Scout*, 112 F.3d 95, 960 (8th Cir. 1997). To hold otherwise, as the Eleventh Circuit does, elevates a defendant's burden to showing that the government agent approved the defendant's conduct – an altogether impossible showing when the government contends the defendant had no authority to commit.

This Court's decision in *Cheek v. United States*, 498 U.S. 192 (1991), is fundamentally at odds with the Eleventh Circuit's approach. *Cheek* explains the controlling principle that a defendant's good faith reliance on the propriety of the actions taken is enough to establish the defendant's innocent intent. That concept was undercut in this case where petitioner Weil believed he was acting pursuant to the authority of an FBI official who in fact

had authority to approve the challenged conduct. That showing is more than sufficient under constitutional standards to require the use of a public authority jury instruction.

Precluding a jury from considering the public authority issue, when an accused has made out a prima facie case of reliance on a government official with actual authority, deprives that defendant of the due process right to present a defense. *See Crane v. Kentucky*, 476 U.S. 683 (1986) (exclusion of testimony about circumstances of confession deprived defendant of right to have jury evaluate its credibility and voluntariness). Because the Eleventh Circuit law limiting the application of public authority as an available defense conflicts with the pronouncements of the other circuits regarding the quantum of proof and unreasonably limits the jury's consideration, review by this Court is in order.

## II. The Use Of A Blockbuster Jury Instruction When The Jury Is Deliberating Reasonably Is Unfairly Coercive And Prejudicial.

The time has come to drastically reduce reliance on the "blockbuster" jury instruction to press a jury to reach a verdict.[4] Courts have become far too dependent on its use, resulting in the unreasonable manipulation of a jury's deliberations. Notwithstanding growing concern

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[4] In *Allen v. United States*, 124 U.S. 942 (1896), this Court approved the practice of admonishing a deadlocked jury to make further efforts to reach a verdict.

about its use,[5] the Eleventh Circuit has nonetheless continued to embrace and expand the use of the *Allen* charge, often at the expense of a defendant's Sixth Amendment right to a jury's fair and impartial deliberations. As a result, the unanimity requirement is unfairly compromised, as is evident in this case.

The Eleventh Circuit's penchant for approving the *Allen* charge, *see United States v. Chigbo*, 38 F.3d 543, 544 n.1 (11th Cir. 1994), is especially evident in this case, in which the trial court's "dynamite" instruction effectively forced a Friday afternoon verdict after less than two days of deliberations following an 18-day trial. At the time of the court's instruction, the jury had affirmatively announced that it was actively deliberating, having just changed their collective minds concerning a partial verdict. Without even notifying defense counsel that a modified *Allen* charge would be given as to one of the defendants, the trial judge proceeded to emphasize to the jury the benefit of reaching a unanimous verdict (App. 17-19). Within one hour, the jury found both defendants guilty.

The Eleventh Circuit's broad and unrestrained acceptance of *Allen* instructions is contrary to the caution encouraged by the other circuits, which carefully evaluate the coercive nature of dynamite charges based on (1) the actual language used, (2) the length of deliberation following the charge, (3) the total time of deliberations, and

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[5] *United States v. Burgos*, 55 F.3d 933, 941 (4th Cir. 1995); *United States v. Quintero-Barraza*, 57 F.3d 836, 842 (9th Cir. 1995); *United States v. Graham*, 758 F.2d 879, 883 (3d Cir. 1985); *United States v. Silvern*, 484 F.2d 879, 883 (7th Cir. 1973) (en banc).

(4) the indicia of jury pressure based on the need for further instructions. *See United States v. Smith*, 635 F.2d 716, 721 (8th Cir. 1980) (citing *United States v. Beattie*, 613 F.2d 762, 765-766 (9th Cir. 1980)). This case represents the ideal vehicle to reign in the Eleventh Circuit's expansive application of blockbuster instructions, thereby restoring uniformity among the circuits and validating the jury's duty to deliberate based on the evidence, without unnecessary interference from the court. Whereas the issue continues to divide the courts, involvement by this Court will assist courts, juries, and litigants in assuring that jury deliberations are free from unreasonable intrusion.

## III. The Seizure By The Prosecution Of Defense Evidence In Open Court Unfairly Compromised The Integrity Of The Jury To Deliberate On The Basis Of The Evidence.

In an inexcusable departure from the orderly presentation of evidence, the prosecution effected the in-court seizure of defense evidence – $10,000 in United States currency – by proclaiming it to be drug money, in the presence of the jury. Rather than admonish the government for its conduct, in a money laundering case in which the jury was to determine if the defendants accepted currency represented to be drug proceeds, the trial judge agreed with the prosecution, instructing defense counsel to "give that money to the government," once again in the jury's presence. (App. 15).

The trial judge has the constitutional "responsibility of safeguarding the integrity of the trial." *United States v. Gainey*, 380 U.S. 63, 68 (1965). That neutral obligation was

conveniently ignored by the trial judge, in her haste to provide judicial approbation of the government's otherwise weak case. The combined action of the prosecutor and the approval of the court essentially stood the presumption of innocence on its head, causing the jury to conclude that the court had already determined that the petitioners were guilty of laundering drug money.

As this Court recognized in *Estelle v. Williams*, 425 U.S. 501, 505 (1976), the presumption of innocence "is a basic component of a fair trial under our system of criminal justice." *E.g., Coffin v. United States*, 156 U.S. 432, 453 (1895). This constitutional "assumption that is indulged in the absence of contrary evidence[,]" *Taylor v. Kentucky*, 436 U.S. 478, 483 n.12 (1978), carries with it the fundamental norm that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Id.* at 485.

Just as jurors look to the guidance of the trial judge in determining how to proceed in a case, *e.g., Carter v. Kentucky*, 450 U.S. 288, 304 (1981), a judge's mid-trial announcement in a money laundering trial that the government could seize defense evidence because it is drug money is the equivalent of directing a verdict in favor of the government. This judicial comment undermines the jury's function of determining guilt beyond a reasonable doubt on the basis of the evidence. *In re Winship*, 397 U.S. 358, 364 (1970). The Eleventh Circuit's approval of this conduct in a serious criminal case calls out for supervision and review by this Court. Our adversary system cannot function when the trial judge departs from her

role as a neutral arbiter and embraces the prosecution's role. In order to protect considerations of fundamental fairness, this Court should provide guidance to trial judges in the context of their roles as neutral and impartial officers.

## IV. *Apprendi* Prohibits A Sentence Enhancement Based On Evidentiary Factors Not Charged In The Indictment.

When imposing sentence based on evidentiary factors such as the amount of money involved in a money laundering scheme, a court is not free to evaluate the proof in the absence of a jury determination of the facts based on a sufficient allegation in the indictment. When an indictment limits the amount of money for the jury's consideration, a sentencing judge is not free to make a separate determination in order to reach facts not presented to the jury. To do so violates the principal objective of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in which this Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt."

Whereas the Eleventh Circuit approach has been to reject the broader application of *Apprendi* whenever the sentence is within the statutory maximum, notwithstanding the binding impact of lower sentencing guidelines, *e.g., United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001) (en banc), other courts continue to recognize that any fact which alters a defendant's range of punishment is subject to the *Apprendi* analysis. *See United States v. Mack*, 229 F.3d

226 (3d Cir. 2000) (Becker, C.J., concurring); *United States v. Norris*, 143 F.Supp. 2d 243 (E.D.N.Y. 2001) (relevant conduct which increases a defendant's sentencing exposure must be found by the jury beyond a reasonable doubt).

Consistent with this Court's core mandate that the Due Process Clause compels the involvement of the jury with any fact that increases a criminal penalty, *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999), that the sentencing statute authorizes the penalty actually imposed does not countermand *Apprendi*. *See generally Ring v. Arizona*, 2002 WL 27836, No. 01-488 (Jan. 11, 2002) (certiorari granted to determine constitutionality of death penalty scheme in which judge decides the penalty). In this case, the Eleventh Circuit approved the use of uncharged relevant conduct to increase petitioner Weil's sentence by nearly two years. The conflict with *Apprendi* calls out for Supreme Court review as a component of national uniformity, especially where the prejudice associated with an increased sentence is uncontroverted. *See Glover v. United States*, 531 U.S. 198 (2001) (increased prison sentence satisfies prejudice prong for ineffective assistance of counsel).

## CONCLUSION

The Eleventh Circuit decision in this case threatens fundamental notions of due process and individual liberty. Certiorari review is necessary to correct the

imbalance within the circuits and to restore fundamental fairness to the criminal justice system within the Eleventh Circuit.

Respectfully submitted,

BENEDICT P. KUEHNE
*Counsel of Record*
SALE & KUEHNE, P.A.
Bank of America Tower, Suite 3550
100 S.E. 2 Street
Miami, Florida 33131-2154
Telephone: 305.789.5989
Fax: 305.789.5987
Email: ben.kuehne@lawyers.com
*Counsel for Petitioners*